Supreme Court, U.S.
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No. 96-1182

In The

Supreme Court of the United States

October Term, 1996

CAROLYN DENISE ANDERSON,

Petitioner,

v.

ROBERT HOLIFIELD, and LYNNE HOLIFIELD, d.b.a. 7-Eleven, ANNE LOLOGO,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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OPPOSITION BRIEF TO PETITION FOR WRIT OF CERTIORARI

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of the State of California.

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of the State of California was entered on October 23, 1996. The Petition for a Writ of Certiorari was filed on January 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This matter involved an employee who was hired by the Respondents Robert and Lynne Holifield to work as a part-time sales clerk and stocker in both Respondent Holifields' 7-11 franchises in Seaside, California. (Reporter's Transcript, hereinafter "RT," 1926:23-28; RT 1930:9-16) Petitioner has diabetes.

Petitioner worked in Respondents Holifields' stores for approximately 2 months from early September, 1991 to November, 9, 1991 at which time she quit. (RT 1613:5-1614:7)

Prior to Petitioner quitting her job, she suffered an insulin reaction while working. (RT 1566:4-7) Because Mr. Holifield could not locate Petitioner's glucose tablets, he called an ambulance and she was transported to the hospital. (RT 1566:10-12) Subsequently, Mr. Holifield

requested that Petitioner obtain some type of medical clearance that she was healthy and could return to work. (RT 1567:6-9) After he obtained some assurance, and based on his own observation that Petitioner was healthy (RT 1571:16-23) Mr. Holifield immediately placed her back on the work schedule. (RT 1571:9)

The day before Petitioner quit working she was involved in an altercation with a co-worker, Respondent, Anne Lologo, at one of the stores. As a result of the altercation, Petitioner claimed damages due to injuries.

The following day, Petitioner went to speak with Respondent Mr. Holifield regarding the incident. In addition to his intention to gather information regarding the incident, Mr. Holifield had also intended to speak with Petitioner regarding potential problem areas in relation to her work performance. (RT 1602:26-1603:5 and 1606:21-1607:9) After Respondent Mr. Holifield had spoken to Petitioner about the incident (RT 1611:18-1612:17) he proceeded to discuss with her some areas of concern that he had regarding her work performance. She immediately began to accuse him of firing her because she was a diabetic. (RT 1612:14) Mr. Holifield said that he was not firing her. Petitioner then became irate, used profanity and left the office. At no time was she terminated.

Subsequently, Petitioner brought this action for discrimination and harassment, assault and battery, and defamation. During the argument of Respondents' attorney's motion for nonsuit at the close of Petitioner's case, Petitioner withdrew the cause of action for defamation. (RT 1783:10-11) Therefore, the only issues that were presented to the jury were based on two causes of action, the first

being discrimination based on a physical disability by termination and non-termination activities against the Holifields; and the second cause of action for assault and battery against Lologo and the Holifields.

The jury found that the Petitioner had not been actually or constructively terminated by Respondents. The jury further found that Respondents Holifields were not vicariously liable for the actions of their employee for assault and battery.

Petitioner sought review by the Sixth District Court of Appeal asserting approximately 40 separate errors committed by the trial court. The Court of Appeal affirmed the trial court's decision on July 10, 1996. Petitioner than requested a rehearing by the Court of Appeal, which was denied on July 31, 1996. Petitioner then petitioned the California Supreme Court for review of the decision of the Sixth District Court of Appeal. The California Supreme Court denied the petition for review on October 23, 1996. Petitioner seeks review from the California Supreme Court's denial of her Petition for Review.

MISSTATEMENTS OF FACT

Pursuant to Supreme Court Rule 15.2 Respondents submit that the following are misstatements of fact or law raised in Petitioner's Petition for Writ of Certiorari:

Petitioner states on page 5 of his Petition for Writ of Certiorari:

> "The next morning Anderson went to Mr. Holifield's office where he told her that because of her insulin reaction he did not feel that she

was physically able to work at his 7-Eleven store *any more*. (RT 1295:17)."

In Petitioner's direct testimony regarding the incident she stated that Respondent's concern with her inability to work was temporary and directly related to the fact she had just been hospitalized. Petitioner's testimony then reflects that she was added onto the schedule within several days. (RT 1296:8-18).

Petitioner then states that "when Anderson accused him of firing her because of her diabetes, he responded that before she could return to work *she* would need to arrange to have her physician contact Mr. Holifield to satisfy his concerns. Holifield admitted the above in his testimony. (RT 1565:2-1566:9; 1569.18)" Petitioner's construction of this paragraph creates the impression that there was some causal connection between the insulin reaction of October 12th and the subsequent discussion between Petitioner and Respondent Holifield of November 10, 1991. The two incidents are unrelated. Furthermore, the citation provided by Petitioner does not support the above statement.

Petitioner also made the following statement: "The next morning, November 10, 1991, Anderson met with Holifield and explained Lologo's assault and battery upon her the night before. No sooner had she finished when Holifield told Anderson of his "intent to terminate her." (RT 1562:1-11).

Not only is Petitioner's statement unsupported by the citation provided, it is also patently false. Petitioner's citation to the Reporter's Transcript actually reads as follows:

"between Mrs. Lologo and Denise, did you not?

A. Yes.

Q. And was it not you feeling that because of Denise's diabetic condition, she had to take more frequent breaks than the normal employee?

A. To some degree, and permission has been given to do this.

Q. And was it not, sir, your understanding that Denise would sometimes be seen taking a break in the cooler and you felt that this was quite possibly related to her diabetes?"

Obviously, Petitioner's cite to the record is incorrect and contains testimony unrelated to the conversation between the parties of November 10, 1991. The relevant portion of the proceedings dealing with the Respondent's alleged intent to terminate Petitioner are as follows:

7 BY MR. LOFTUS: Q. Did you use the
8 words with Denise in your conversation with her on
9 November 10, 1991, quote: It is my intent to
10 terminate you, but before I do I want to discuss a
11 number of things with you, end of quote?
12 HOLIFIELD: I do not recall making that exact statement.
13 Q. Do you deny making that statement?
14 A. I know that I advised Ms. Anderson that there
15 were some problems with her performance that I need to
16 discuss with her.
(RT 1565:7-16)

Finally, Petitioner stated that "Approximately two weeks after her termination an extensive recorded statement was taken from Holifield with his knowledge by an

attorney-private investigator retained by Anderson's counsel in which Holifield admitted firing Anderson, but asserted that the firing was due to employment deficiencies that she demonstrated, some of which he admitted might have been due to her diabetes."

Conspicuously absent from the above quotation is Petitioner's attempt to cite corresponding reference to the Reporter's Transcript. This is simply because the record on appeal is devoid of any supporting evidence that Petitioner was terminated, nor that the reason for her alleged termination was her diabetes.

REASONS FOR DENYING THE WRIT

I. Petitioner has not presented the Court with an important or compelling issue for review.

Supreme Court Rule 10 provides in pertinent part:

> "Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

In other words, the Court will grant a petition for writ of certiorari only when a substantial issue is present. In Supreme Court Rule 10, the Court outlines several factors, which although are not controlling, do indicate the character of the reasons the Court considers in deciding to grant certiorari:

(a) Cases in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same

important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This is simply not an appropriate case for review by the Supreme Court. This matter does not involve a situation where a state court has decided an important federal question that conflicts with the decision of another state court of last resort. Nor does this matter involve a state court deciding an important question of federal law which is in conflict with relevant decisions of the Supreme Court. Rather, this case involves an isolated incident by a less than competent trial attorney to address his inability to properly represent his client. The record is replete with examples during the trial in which the trial court advised Petitioner's attorney as to how to introduce evidence. In almost every one of those occasions, Petitioner's attorney either simply ignored the direction or did not properly follow California trial procedures.

II. The constitutional issue presented by Petitioner as a basis for requesting review by the Court is without merit.

After spending great lengths in discussing the purported errors committed by first the trial court, and then the subsequent ratification of those errors by both the California Court of Appeal and the California Supreme Court, Petitioner shortly discusses the jurisdictional basis for requesting certiorari. She states that while her research has failed to disclose any cases which address the alleged bias and competency issues of a trial court, she does believe that under the rule of *Aetna Life Insurance v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, a proper constitutional basis is present for review.

In *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, the Court decided that a member of the Alabama Supreme Court's financial interests in relation to related pending litigation created bias on the part of the Justice. The presence of such bias on the part of a Supreme Court Justice violated the litigant's due process rights. Specifically, the Court held that the Alabama Supreme Court Justice interest was "direct, personal, substantial and pecuniary." The Court went on to hold that based on this factual finding, the Justice's participation in the case violated the Petitioner's constitutional due process rights.

In this case, Petitioner has made *no* allegations of the trial court's pecuniary interest in the litigation. Rather, Petitioner has only alleged bias on the part of the trial court against either himself or Petitioner directly.

In *Aetna* the Court discussed the issue of constitutional due process rights in cases of alleged bias or prejudice by a judge *without* a pecuniary interest. In dicta, the Court found that the disqualification of a judge on such allegations of bias or prejudice would be "constitutionally required" in only the "most extreme cases." 475 U.S. 821, 823. Petitioner cited this portion of the *Aetna* decision in support of his proposition. Such authority is not controlling.

In sum, the Court decided the due process issue in *Aetna* based not on the petitioner's allegations of the Justice's prejudice or bias against the party, but rather based on the existence of the Justice's financial stake in similar pending litigation. Consequently, the Petitioner's reliance on *Aetna Life Insurance Co. v. Lavoie* to support his proposition is misplaced.

III. In the absence of Petitioner's due process argument, Petitioner's remaining contentions of error only involve the Court of Appeal's alleged misapplication of federal law.

Finally, Petitioner asserts that the Court of Appeal for the Sixth District failed to apply proper rules enunciated by federal decision for determining whether Petitioner had made a prima facie case of disability discrimination particularly in light of the trial judge's premature sua sponte nonsuit of most of her claims. Supreme Court Rule 10 states in pertinent part that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The Court of Appeal for the Sixth District examined Petitioner's assertions of the trial court's improper application of law regarding her claim of disability discrimination. First, the Court made a factual finding that the Petitioner had not been terminated. This finding was well supported by the evidence. Secondly, Petitioner asserted that she was discriminated in her privileges of employment by discriminatory acts other than discrimination. These acts included not permitting the Petitioner to return to work, demanding a medical release, taking Petitioner off the cash register and criticizing her work performance. The Court of Appeal analyzed each contention and found that the evidence presented did not support the claim.

Assuming arguendo that Petitioner's arguments are valid and supported by the record on appeal, at the very most, the alleged errors committed by the Court of Appeal are mere misapplications of a properly stated rule of law. As such, absent any additional basis for review, these alleged errors are not a proper basis for the granting of a Petition for Writ of Certiorari.

CONCLUSION

In conclusion, this case is not one which should be granted certiorari before this Court. It does not involve important or substantial federal issues. In its most basic form, this case involved a clerk who quit her job at a 7-Eleven franchise and then sued her former employer for discrimination based on a disability. After the case was presented to the jury, the jury found that the former

employee was neither terminated nor discriminated against. During the trial, Petitioner's counsel made several errors in the presentation of evidence and the examination of witnesses. The trial court made every attempt to assist Petitioner's counsel in proper trial technique. Petitioner's counsel has now interpreted the trial court's actions as evidence of bias against either or both himself and his client. In attempt to obtain review by the Supreme Court, Petitioner has now couched her allegations of bias in terms of a constitutional deprivation of her right to due process.

Petitioner's Petition fails on several accounts. First, by asserting error by the District Court of Appeal in relation to the allegations of bias and prejudice on the part of the trial court, Petitioner has not presented an important and compelling federal issue to be heard by the Supreme Court. Absent such a compelling issue, the Court has the discretion to deny Petitioner's Petition for Writ of Certiorari. Secondly, Petitioner's attempt of presenting a constitutional due process issue by asserting bias and prejudice by the trial court is completely unsupported by decisional authority. Third, absent the existence of a compelling constitutional issue, Petitioner's argument consists merely of her disagreement with the Court of Appeal's application of the facts in this case to existing federal law. As such pursuant to Supreme Court Rule 10, the Court should only grant certiorari on rare occasions.

It is therefore respectfully requested that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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